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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 330.

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY, PETITIONERS,

VS.

HARDING GLASS COMPANY, RESPONDENT.

PETITION OF RESPONDENT FOR A REHEARING.

JOSEPH R. BROWN,
JAMES B. McDONOUGH,
Counsel for Respondent.

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PETITION OF RESPONDENT FOR A REHEARING.

Comes now the above named respondent, the Harding Glass Company, and presents this its petition for rehearing of the above entitled cause, and in support thereof respectfully shows:

The sole question decided by the Court of Appeals was that a contract between a public utility and its customer, obligating the latter to take all its requirements from the former, was in restraint of trade, against the public policy of Arkansas, and void. That is the sole question presented to this Court by petitioners.

Such a contract tends to create a monopoly and to stifle competition. That as a matter of law appears on the face of this contract itself. The rule is universal that, when the contract on its face shows that its tendency is to create a monopoly or to stifle competition, it is void as a matter of law, and no evidence will then be considered to show its validity or invalidity. Evidence is admissible in such cases only when the contract is valid on its face. In offering testimony, the petitioners assumed that the contract was valid on its face. The respondent objected during the trial to substantially all of the evidence, contending, as alleged in its answer, that the contract was void on its face. The respondent, by cross examination of petitioners' witness, and independently of that, offered testimony tending to show that the contract was a part of the plan to create a monopoly. As shown below, the District Court excluded, on objection of petitioners, important evidence to establish respondent's contention on that point.

We respectfully, but earnestly, contend that this Court in the opinion has not discussed or decided the sole question above named.

Since the opinion in this cause was handed down, we have carefully re-investigated the validity of an exclusive contract between a public utility and a customer, and we have found the rule to be universal that no restraint whatever, however slight, can be tolerated in contracts between a public utility and a customer. We find no dissent from that rule either in America or England.

If the opinion stands, the result is the annulment of the Constitution and statutes of Arkansas upon the points under consideration. We therefore submit that the case involves a problem of judicial power over the Constitution and laws of a state deciding principles no less important than those involved in *Marbury* v. *Madison* and *Gibbons* v. *Ogden*. We therefore request this Court's indulgence on the length of this petition.

Before suggesting the reasons supporting our views, we request permission of the Court to call attention to the peculiar situation in this case. The respondent in its appeal to the Court of Appeals from the District Court relied upon four controlling questions:

> (a) The contract was void on its face, because it tended to create a monopoly and stifle competition, and was therefore against public policy.
>
> (b) Said contract was unenforceable because of lack of mutuality of obligation and remedy, there being no obligation on the part of either petitioner to furnish any gas whatever to respondent, the contract merely giving the right to furnish gas if the Twin City Pipe Line Company "can."
>
> (c) Specific performance of said contract could not be compelled against *petitioners* because it would require a court of equity to employ geologists to determine the drilling and other scientific and business matters.
>
> (d) The said contract could not be specifically performed because it was too indefinite in time and too uncertain to be capable of specific performance.

The Court of Appeals decided the first question in favor of respondent. Petitioners brought the case to this Court for review. Respondent's brief suggested the other questions. If the contract is valid, petitioners, because of reasons above given, are not entitled to specific performance. Is not respondent, therefore, entitled to have the other questions decided? Should not the petition for rehearing be granted, and the cause restored to the docket for reargument and determination on all questions involved? The public policy of a state is a matter wholly within the exclusive power and jurisdiction of a state.

Northwestern Mutual Life Ins. Co. v. *Johnson*, 254 U. S. 96.

Whitfield v. *Aetna Life Ins. Co.*, 205 U. S. 489.

Therefore, the petition for certiorari should be dismissed.

The respondent was not the largest consumer of gas in Fort Smith. The Fort Smith Light & Traction Company used at least 4,000,000 cubic feet per day, and there were 10,000 customers in Fort Smith and Van Buren (R. 124, 126, 138). There is no evidence to show that there was any special development made by reason of this contract (R. 6, 17, 154, 155).

The Twin City, by getting rid of the ten cent gas, received $45,409.83, and deducting the $4,489.92 left it a net profit of $41,519.91. The superintendent of petitioners contended that the eight inch pipe line was of no benefit. However, the facts which he stated showed that it was a benefit (R. 156, 158, 185, 186).

POINTS.

I.

The highest principles of justice forbid petitioners from succeeding in this Court on the ground (which is the foundation of this Court's opinion) that "it is not shown that this contract was made as a part of a plan to create a monopoly or restrain trade," because petitioners, in the trial of this case in the District Court, by their objections (R. 176) secured from said District Court the exclusion of important evidence tending to prove that said contract was a part of said plan, and thus secured a declaration of law from said District Court, which is the foundation of said District Court's decree, that evidence of that nature was immaterial (R. 174-177).

In proving an intent to create a monopoly or restrain trade, a wide range of evidence is admissible, and a fact seemingly unimportant when standing alone, is controlling when considered with other evidence. Authorities on the proposition are unnecessary. There is ample evidence to establish that said exclusive contract was required of the customer for the purpose of securing a monopoly and preventing competition, but as to that only a suggestion can be made.

The truth is, three interests developed the great gas field involved. These interests were active competitors. Respondent is a large consumer, but is only one of numerous customers, there being more than ten thousand, and one using more than four times the gas used by respondent (R. 136, 138). After 1925 gas development was rapid. Hale had acquired two competing interests. He took from petitioners two of their

best customers—respondent and the Fort Smith Light & Traction Company. The latter company required 4,000,000 cubic feet per day (R. 136), more than four times the amount required by respondent (therefore, respondent was not the largest consumer, as suggested in the Court's opinion). Petitioners made a deal for the Poteau, Oklahoma, gas field, whereby that supply would not compete. After Hale sold his competing corporations to petitioners, he developed a great gas field at Gans, Oklahoma, twenty miles west of Fort Smith. The only outstanding supply of gas, other than that owned by the Citizens Gas Company, a subsidiary of respondent, was gas owned by G. T. Cazort. Soon after Hale sold to petitioners, the latter secured an extended contract on the Cazort gas. Immediately, petitioners ceased to fulfill the Hale contract with respondent. The motive is too obvious for discussion. See petitioners' letter of January 24, 1925 (R. 220), written four days after petitioners completed their control of all gas, except the Gans gas and that of the Citizens Gas Company. Hale then, under the name of the Border Gas Company, secured a franchise to furnish natural gas in Fort Smith (R. 200). The next move was to kill possible competition from the Gans gas.

With the above recital of facts tending to show the contract in question was intended as part of a plan to create a monopoly, we invite the Court's attention to respondent's further efforts to show reasons for the purchase of the Gans gas by petitioners. That transaction was carried on between Hale, who acted for owners of the Gans gas, and Thompson Ross. The rela-

tion of Ross to petitioners is not shown, but the evidence shows Ross acted for petitioners.

Respondent's further efforts to bring out all testimony tending to show the monopolistic scheme appear at page 175 of the record:

"Q. That contract is signed by what companies?
"A. Signed by an individual and Mr. Hale as an individual. Two individuals acted in the purchase of that property, S. H. Hale and Thompson Ross.
"Q. The gas in Oklahoma was not owned individually by Mr. Hale?
"A. Mr. Hale acted in the deal to sell those properties over there.
"Q. Do you know whether the title to those properties was in Mr. Hale or in some corporation?
"A. Two corporations in which he owned all the stock.
"Q. In other words, he controlled it like he controlled the companies over here?
"A. Yes, sir.
"Q. You saw that contract I believe you say?
"A. Yes, sir.
"Q. Did the two corporations that owned the wells in Oklahoma join in that contract?
"A. Mr. Hale contracted with Mr. Ross to make delivery of certain properties belonging to certain corporations, which was afterwards done.
"Q. Then the corporations in Oklahoma did not sign the contract?
"A. My recollection it was a contract between the two individuals.
"Q. Was the Industrial Oil & Gas Company a party to that contract?
"A. No, sir, in no way.
"Q. I would like to ask you to produce a copy of that contract. You can take time to do it.
"A. I don't know if that contract will be available to me in any way.

"Mr. Miles: We have no objection. The contract fixes whether it was a sale for all the stock in those corporations. The contract of sale of those properties was a transfer of one hundred per cent of stock from one man to another. The corporations did not sign. Now if the Court rules it is necessary to get that contract we will get it but we will have to delay the case.

"The Court: The point is, do you object?

"Mr. Miles: We object.

"The Court: On what ground do you claim you are entitled to it?

"Mr. McDonough: It is on the ground that it throws light upon this transaction, our theory being that the purpose of all these deals is to secure a monopoly of the gas.

"The Court: Do you make that a defense in your answer?

"Mr. McDonough: Yes, sir.

"The Court: How can that be a defense to this contract?

"Mr. McDonough: *It is that the contract is carrying out the monopoly and in restraint of trade and is void because against piblic policy. That is my theory of it. If the evidence shows, as we think it will if we can get it all, that the purpose of all these contracts is to maintain an absolute unyielding monopoly over the gas that goes to this community, then it is in restraint of trade, this contract being a link in that chain.*

"The Court: The objection will be sustained."

The purpose of the evidence offered is stated by respondent's counsel (R. 176). It was to prove the plan to create a monopoly, and that the contract was a part of that plan. The District Court held the evidence inadmissible. The District Court held that evidence showing the contract was a part of the plan to monopolize the gas *constituted no defense.* This Court in the

opinion holds such evidence constitutes a defense. Yet, this Court is about to affirm the District Court's decision, which precluded respondent from making the proof, and making further efforts to offer additional proof.

Petitioners' counsel (Brief p. 12), referring to the contract, assert "that it was not part or parcel of any scheme by which the utility sought to tie up industries generally in order to avoid competition." This Court adopted that theory of the case inadvertently overlooking the above record, as we believe. In adopting that theory, this Court said: "And it is not shown that this contract was made as a part of a plan to create a monopoly or restrain trade . . ."

It is our contention that said cause should not be reversed. If, however, the Court should think otherwise and reverse it, we truly believe some provision should be made to permit respondent to make its offer of proof good, and show that this contract was a part of the plan of monopoly.

II.

Error of the Court as to Burden of Proof.

The Court's opinion is based upon the assumption that the contract is valid upon its face. As the rule is universal that no public utility can make an exclusive contract with a customer, it follows that this contract is void upon its face. The cases elsewhere herein cited so hold, and we have found no decision to the contrary. This rule of law is made clear by Williston on Contracts in his chapter on illegal agree-

ments, and especially at Sections 1645, 1651 and 1753. In the trial of this case, therefore, respondent was not required to introduce any proof whatever to defeat the enforcement of this contract. If the contract is valid upon its face, the burden would be upon the respondent; otherwise not.

Elliott on Contracts, Sec. 4676, and cases.
13 Corpus Juris, p. 761, and cases cited in notes 88, 89.

Therefore, as a matter of law, there can be no decision against respondent (as indicated in the Court's opinion) on the ground that it was not shown that the contract was part of a plan to create a monopoly; nor can it be held that the respondent "has failed to show that the contract has any tendency to injure the public." On the latter point the contract shows on its face, as a matter of law, that it does injure the public.

In *Mitchell* v. *Reynolds*, 1 Peere Williams 180 (190), the court said:

> "In all restraints of trade, where nothing more appears, the law presumes them bad."

The Arkansas court has universally held that any contract whose tendency is to stifle competition is void. That the present contract stifles competition is certain.

Horner v. *Graves*, 7 Bing. 735 (743).
Elliott on Contracts, Secs. 651 and 758.
United States v. *Addyston Pipe Line Co.*, 85 Fed. 271; 175 U. S. 211.

III.

The question presented to this Court in the petition for certiorari, in the brief thereon, and in petitioners' brief on the merits (see latter brief p. 2), was whether, under the Arkansas Constitution, and laws, and the decisions of the courts of that state, an exclusive contract between a public utility and a customer was void as in restraint of trade and against public policy, and therefore void.

The petition of petitioners and briefs thereon show that that was the sole question presented. See also page 10 of petitioners' brief on the merits. Counsel for the respondent respectfully submit that this Court has not discussed or decided that exact question.

The public utility owes the *duty* already to supply the customer with gas. Said public utility cannot, therefore, bind a customer to take exclusively from it. *The reason is that such a contract prohibits any other gas producing, gas transportation, or gas selling company from developing the great resources of gas that underlie the ground in that community.* Such a contract precludes the incoming of any rival because all customers are bound hand and foot to the petitioners by this exclusive feudal contract, and consequently the petitioners *by the contract* are granted a monopoly without the consent of the governing municipality, and without complying with Arkansas statutes whereby exclusive franchises may be granted; and therefore petitioners obtain rights and privileges of an exclusive franchise without the burdens of complying with Arkansas law; and in the very teeth of that law deprive the municipality of its statutory control (see Acts

1921, pp. 199-200, and C. & M. Dig., Secs. 5448 and 7492) by such exclusive contracts.

All authorities in English and American Jurisprudence, without dissent so far as our search has gone, hold *partial restraint of trade, however slight, will not be tolerated in any contract between a public utility and a customer.* In *Gibbs* v. *Consolidated Gas Co.,* 130 U. S. 396, the contract on which Gibbs sought to recover, had the effect of destroying competition, *although there existed in Maryland ample regulatory power.* Does the Arkansas Constitution exempt from its provisions communities which have regulatory bodies to control rates? An exclusive franchise "for a reasonable time," is not a monopoly and does not stifle competition, but an exclusive contract for all time or the life of the gas field, which may be a hundred years, kills competition.

The following authorities support the view that no restraint, *however partial,* will be upheld *in any contract* between a customer and a public utility:

Wyman on Public Service Corporations, Secs. 681, 685.

Pond on Public Utilities, Secs. 205, 207, and cases there cited.

Reeves v. *Decorah Farmers' Cooperative Society,* 160 Iowa 194.

W. W. Montague & Co. v. *Lowry,* 193 U. S. 38.

Anderson v. *Jett,* 89 Ky. 375.

Chapin v. *Brown Bros.,* 83 Iowa 156.

Boutwell v. *Marr,* 71 Vt. 1.

13 Corpus Juris, p. 480, Sec. 423.

Barrow v. *McMurtry Mfg. Co.,* 54 Colo. 432.

Anderson v. *Shawnee Compress Co.*, 17 Okla. 231.
19 R. C. L, 36.
Joyce on Monopolies, Sec. 92, pp. 119 and 120.
Sampliner v. *Motion Picture Patent Co.*, 255 Fed. 242.
Coombs v. *Burk*, 40 Cal. App. 8; 180 Pac. 59.
Elliott on Contracts and New Supplement, Sec. 817.
Arnold v. *Jones Cotton Co.*, (Ala.) 12 L. R. A. (N. S.) 150, and note.
Chicago, I. & L. Ry. Co. v. *Southern Ind. Ry. Co.*; (Ind.) 70 N. E. 843.
Williston on Contracts, Sec. 1645.
Santa Clara Valley Mill & Lumber Co. v. *Hayes*, 76 Cal. 387.
Shasta County v. *Moody*, (Cal.) 265 Pac. 1032.
Tuscaloosa Ice Mfg. Co. v. *Williams*, 127 Ala. 110.

In Williston on Contracts, Section 1651, appears this language:

> "Public service companies are more strictly limited than others in entering into contracts in restraint of trade, because of their duty to give equal service to the public. They can make no contracts inimical to that duty."

The right of private contract must yield "to the exigencies of public welfare."

Union Dry Goods Co. v. *Ga. Pub. Ser. Corp.*, 248 U. S. 372.

Exclusive Contracts in Arkansas Between a Gas Public Utility and Its Customers Conflict With Act 124 of 1921. See Acts 1921, pp. 199-200.

The Arkansas Legislature, in the passage of that act, was without power to substitute regulation for

competition. Said act is exceedingly broad. It does not, and could not, destroy the established rule by common law and the Constitution of Arkansas that any contract which tends to stifle competition is void. Said act includes "all matters pertaining to the regulation and operation * * * of every gas company furnishing gas for domestic or industrial purposes." That act in effect prohibits the making of any exclusive contract with a customer by the gas company, because:

If a gas company may make an exclusive contract with one customer, it may make such contract with all customers. If such gas company has the power to make such an exclusive contract with all members of the public, necessarily it would have the right to demand that exclusive contract as a condition for furnishing the service. Necessarily, the existence of such a power to make such exclusive contracts grants to the public utility at least *a part of the control which the act imposes upon the municipality.* If a public utility can make exclusive contracts with every customer, the municipality would legally have but little control over the public utility.

There is no Arkansas decision which holds that regulated monopoly is better than competition. Until Arkansas changes its Constitution, such contracts must be held void. Regulation alone is insufficient to protect the public. It is easy for a regulated gas monopoly to permit its development to lag, to permit a slow down in its service, to permit excessive salaries to overhead officials, to plead a scarcity of gas, and to offer a thousand other excuses for an increase in price. Being

a monopoly, it does not fear competition; and being in possession of all the facts, it may easily defeat any effort of the regulatory body to prevent a wrongful increase of rates. Besides, increase in prices is not the only evil of a monopoly. It may reduce its service and do many other things injurious to the public.

In *Mitchell* v. *Reynolds,* 1 Peere Williams, 180 (190), more than two hundred years ago, an English Court suggested this danger, referring to "corporations who are perpetually labouring for exclusive advantages in trade and to reduce it into as few hands as possible." See Williston on Contracts, Sections 1635, 1645 and 1651.

The theory of the beneficial monopoly displacing competition breaks down when the monopolist, by means of contracts such as this, can prevent the further development of natural resources. Is it not clear that the "presumably just" rates the gas company will be permitted to charge will be based upon the amount of gas made available by it in proportion to its investment? Is it not equally clear that if it is permitted to control its customers by contracts such as this, it will never develop a supply of gas sufficient to cause it to lower its rates? This record shows one increase since this contract and even since this suit was brought (R. 216). The petitioner, the Twin City Pipe Line Company, merely notified the regulatory body that it would increase its rates (R. 216) and did so. Is it not equally clear that no rate-fixing or regulatory body on earth can compel the gas company to open new fields and new supplies? It is true that

the public, nor the legislature, nor the regulatory body may realize the injury to the public, but the injury is there enriching the monopolist at the expense of the public.

Is it not true also that the enforcement of such exclusive contracts between customer and public utility can find no justification in a supposed necessity of protecting the utility or the public from unregulated and theoretically ruinous competition? This ruinous contract affects, injuriously to the public, the gas supply as well as the transportation and sale. The petitioners own the rival transportation lines and the rival distribution systems, and if they are permitted to make these exclusive contracts with their customers, the monopoly is complete in violation of the Arkansas Constitution.

The Supreme Court of Arkansas Specifically Denied the Monopoly Which Petitioners Seek to Establish By Enforcing This Contract.

In addition, the petitioners have proved in this record that the Supreme Court of Arkansas specifically denied the exclusive monopolistic right which petitioners are endeavoring to enforce in this lawsuit. Said petitioners introduced in evidence the pleadings (R. 190-202) and the opinion of the Supreme Court of Arkansas (R. 203-211) in the case of the petitioner, the Twin City Pipe Line Company, against Citizens Pipe Line Company, latter being the owner of a pipe line transporting gas for the respondent from the gas fields of Oklahoma to the Harding glass plant in the

State of Arkansas. That case is reported in 178 Ark. 309.

The petitioner in that case made an assault upon the right of the Citizens Gas Company and the Citizens Pipe Line Company to pipe gas through the streets of Fort Smith to the Harding glass plant. It was charged by the defendant in that case that the Twin City Pipe Line Company had wrongfully brought that suit in order to establish an unlawful monopoly. It was contended in that case that the granting of a franchise to the Citizens Pipe Line Company interfered with the rights of the Twin City Pipe Line Company. The Supreme Court of Arkansas decided against all the contentions of the petitioner, the Twin City Pipe Line Company. The State granted the franchise to the Citizens Pipe Line Company and thereby declared that that company had a right to transport gas through the streets of Fort Smith for the purpose of supplying the needs of the Harding Glass Company. The decision by the Supreme Court of Arkansas in that case is in effect a judicial declaration that the petitioner is not entitled to a monopoly. The Court upheld the franchise, and the franchise granted the right.

IV.

The Arkansas Court has held consistently from the foundation of the Court that every contract whose tendency is to create a monopoly or stifle competition is void.

This principle was clearly declared by the Supreme Court of Arkansas in *Patterson* v. *Rogers*, 148 Ark. 222, in the following language:

> "This court has in more than one case upheld contracts in partial restraint of trade; *but in doing so we have recognized that the contract is of such character that the rights of the public may be involved; and where the contract results in the creation of a monopoly, it is void as contrary to public policy.*"

In support of that the Court cited *Wakenight* v. *Spear,* 147 Ark. 342; and *Shapard* v. *Lesser,* 127 Ark. 590.

The evil condemned in *Shapard* v. *Lesser* was that of an agreement between two parties to suppress competition. The Arkansas Court ruled the same way in the case of *Woodruff* v. *Berry,* 40 Ark. 252, citing the decision of this Court in *Gibbs* v. *Consolidated Gas Company,* 130 U. S. 396. The evil condemned by this Court in that case was the provision in the contract dividing the territory between public utilities. This Court held that the effect of that was to destroy competition.

The Arkansas Court has decided many cases as indicated in *Patterson* v. *Rogers,* wherein it held that a partial restraint of trade between private individuals did not make the contract invalid. The Arkansas Court, however, has never held that any contract which tends to create a monopoly is valid. It has always held that any contract which tends to create a monopoly or stifle competition is contrary to the genius of a republic and shall not be.

The Arkansas Decisions Are Conclusive.

In our opinion, the principle involved is decided by the three Arkansas cases above referred to. We deem

it our duty, however, to call this Court's attention to other Arkansas cases, for the reason that if we are right that the Arkansas Court has decided the principle holding this contract invalid on its face, as a matter of law those decisions necessarily lead to the affirmance of this case.

In the case of *Clear Creek Oil & Gas Co.* v. *Fort Smith Spelter Co.*, 148 Ark. 260, a question arose as to the validity of a contract between the appellant in that case, which is the same corporation referred to in the record in this case, and a customer as to the validity of a contract between a customer and a public utility. The counsel for the customer in that case were the same as counsel for the petitioners in the present case. On pages 264 of the report in that case, the Court in discussing the question of the validity or invalidity of a contract between a public utility and a customer, said:

> "Learned counsel for appellees candidly concede that, if appellant was organized as a public service corporation and at the time of the execution of these contracts it was operating as such public utility in the production and distribution of gas, the contracts were void, so far as they undertook to confer special privileges upon appellees. . . ."

That case finally came to this Court (*Fort Smith Spelter Co.* v. *Clear Creek Oil & Gas Co.*, 267 U. S. 231), but this Court did not discuss that question.

In the case of *Culp Bros. Piano Co.* v. *Moore*, 162 Ark. 292, the Arkansas Court approved an instruction, which instruction made the distinction between a

contract made in the purchase of a business with a reasonable restraint to protect the purchaser and a contract the effect of which was to stifle competition.

In the case of *Cox* v. *Donnelly*, 34 Ark. 762, a question arose as to the public policy of Arkansas in a case where parties had dealt with public lands. The case is based upon the theory that any contract which is in contravention of *public policy* is void. The Court in that case used this language:

> "And it is a proposition admitting of no exception, that contracts in violation of law *or against public policy* are void, and courts will not lend their aid to enforce them."

In the case of *Paul, Admr.* v. *Stuckey*, 126 Ark. 389, the Arkansas Court defined public policy. The exact question here involved, however, was not involved there; but the Court did refer with approval to the case of *Woodruff* v. *Berry*, 40 Ark. 251, for a correct definition of public policy. In the Woodruff case, the Arkansas Court adopted the views of this Court as to the invalidity of any contract which tended to establish a monopoly or to stifle competition, in the case of *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396.

In the case of *Edwards* v. *Randle*, 63 Ark. 318, the Arkansas Court again declared the law to be that any contract against public policy was void.

The following cases support the principle:

Schaap v. *Robinson*, 133 Ark. 113.
Bourland v. *First National Bank Building*, 152 Ark. 139 (149).

Carter v. *Bradley County Road Improvement Dist.*, 155 Ark. 288 (298).
Edgar Lumber Co. v. *Cornie Stave Co.*, 95 Ark. 449 (454).
Mendel v. *Davies*, 46 Ark. 420 (422).

It is our contention that the exact question involved here came before the Supreme Court of Arkansas in the case of *Shapard* v. *Lesser*. That was a contract to stay out of business. The Court held that it tended *to stifle competition*, and was therefore a detriment to the public and was void. Among other authorities cited by the Arkansas Court on the point appear 6 R. C. L., Section 196, page 791, and Page on Contracts, Section 434, page 685. The case of *Shapard* v. *Lesser* is annotated in 3 A. L. R. 247, with an annotation beginning at page 250.

In the case of *Wakenight* v. *Spear*, 147 Ark. 342, the Arkansas Court again noticed the distinction in the case of contracts between private parties in partial restraint of trade and other contracts which were against public policy. The Court referred to the case of *Shapard* v. *Lesser* with approval and used this language, which applies here:

> "In other words, our holding was that it was contrary to public policy for two parties to make a contract whereby one might have a monopoly."

V.

The Contract Is Void Because It Lacks Mutuality.

This Court did not discuss that question at all. That was the second question, as is shown by the assignment of errors (R. 247) presented to the Court

of Appeals. As that Court decided the first question in favor of the respondent, we assume that said Court did not deem it necessary to discuss any other proposition.

Since this Court, in the opinion, holds that the contract is valid under the public policy doctrine, the question necessarily arises whether said contract is mutually enforceable. We made that suggestion in our brief on the merits. See page 52 thereof. It is submitted that the following authorities support respondent's contention on that point:

Pomeroy on Specific Performance, (Third Edition) Sec. 165.
Electric Management Corporation v. *United Power Co.*, 19 Fed. (2d) 311.
Heckinger v. *Dinkler Hotel Co.*, (Ga.) 132 S. E. 113.
Hind v. *Bertaut Company*, 9 Fed. (2d) 191.
Cold Blast Transportation Co. v. *K. C. Nut Co.*, 114 Fed. 77.
McGown v. *Camp Co.*, 68 So. 263.

There is absolutely no obligation on the Twin City Pipe Line Company or the Industrial Oil & Gas Company to furnish any gas whatever. When the contract says "so long as the Twin City Pipe Line Company *can* adequately supply its requirements," it merely means as it may will or wish to supply.

VI.

The Contract, Even If Valid, Cannot Be Specifically Performed.

This and the preceding question, though suggested in our brief (p. 52), are not noticed by the Court at

all. Even if the contract is valid, the cause should be affirmed on this ground. This was the third question discussed by the Court of Appeals.

To require the specific performance of this contract in a suit brought by the respondent against the petitioners would require a court's supervision of the drilling of wells, the reports of geologists, examinations by geologists, and innumerable other things which a court of equity will not undertake. If the contract cannot be enforced by the respondent against the petitioners, the latter cannot enforce it against the former. This contract, under the Arkansas decisions, cannot be specifically performed.

Nakdimen v. *Atkinson Improvement Co.*, 149 Ark. 448.
Leonard v. *Board of Directors*, 79 Ark. 42.
Warmack v. *Major Stave Co.*, 132 Ark. 173.

In the last case, the Arkansas court expressly held that specific performance could not be compelled.

This Court, however, in the opinion suggests that public utilities may enter into reasonable arrangements with their customers when warranted by special circumstances, citing the case of *Warmack* v. *Major Stave Co., supra.* The only arrangement made in that case was one relating to the *manner of paying the utility by the Stave Company for the service.* The contract was not an exclusive contract. That "reasonable arrangement" was not a contract whereby the public utility bound its customer to take the service for all time to come.

The result is that the decision of the Court of Appeals of the Eighth Circuit was right on the whole

case. If this Court is of the opinion that the contract is valid, then said Court gave a wrong reason for a correct decision.

Thomas v. *K. C. S. Ry. Co.*, (8th Cir.) 277 Fed. 708.

That case came to this Court and the decision of the Circuit Court of Appeals was affirmed, although this Court in the opinion did not discuss the question of the case being correctly decided and a wrong reason assigned by the District Court, but did affirm the case.

Thomas v. *K. C. S. Ry. Co.*, 261 U. S. 481.

VII.

The Contract Is Too Indefinite in Time to Be Enforceable.

The contract, if valid, obligates the Harding Glass Company to take all its requirements from the Twin City Pipe Line Company "so long as the Twin City Pipe Line Company can adequately supply its requirements."

This Court in the opinion relies upon the case of *Fort Smith Light & Traction Co.* v. *Kelley*, 94 Ark. 461, as supporting the opinion of the District Court. A reexamination of that case is convincing that it not only does not support the opinion of the District Court, but is contrary thereto. This Court seems to be of the opinion that the said Kelley case holds that a contract in partial restraint of trade is valid. That case does use that language. However, before it used that language, the Court specifically said that *that contract did*

not in any manner restrain trade. An examination of the contract shows that it did not and could not restrain trade. That contract on its very face provided *for the widest competition.* The right to competition was expressly recognized in that contract. Every producing company had the right to sell gas in competition with Kelley under that contract. Therefore, the Court correctly held that that contract recognized competition and did not restrain trade. Therefore, anything which that Court said thereafter about that contract being in partial restraint of trade is wholly *obiter dictum.*

This Court also cites *Warmack* v. *Major Stave Co.,* 132 Ark. 173. The decision in that case expressly holds that specific performance will not be decreed against a public utility. The Court affirmed the case on the *duty* which the public utility owed to the customer. In the instant case, there is a duty upon the petitioners to furnish the gas under the law. Hence an agreement to furnish the gas on condition that the respondent take all its gas for all time to come is without consideration and void.

The Court in the opinion also cites the case of *Cap F. Bourland Ice Co.* v. *Franklin Utilities Co.,* 180 Ark. 770. We most respectfully urge that that case supports the contention of the respondent in this case. In that case the ice company endeavored to establish a monopoly through an order of the Railroad Commission prohibiting the establishment of another ice company at Fort Smith. There was no question of a contract between a public utility and a customer involved in that case. The only question was whether the act of the legislature was invalid as establishing a monop-

oly in violation of the Constitution of Arkansas. The Court held it invalid. Therefore, anything which the Court said thereafter indicating that there might be a monopoly is *obiter* and has no bearing upon this case.

For the reasons indicated, it is respectfully submitted that the petition for rehearing should be granted, and because of the great importance of the questions involved and their far-reaching effect, counsel respectfully ask, if consistent with the Court's rules, that said cause be restored to the docket and set for reargument, and that at the final hearing said cause be affirmed.

Respectfully submitted,

JOSEPH R. BROWN,
JAMES B. MCDONOUGH,
Counsel for Respondent.

Certificate of Counsel.

I, James B. McDonough, counsel for the above named respondent do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay. I further certify that after receiving the opinion of the Court in this cause, I carefully re-read the record and re-investigated the authorities, and, in my opinion, said petition is well taken.

JAMES B. MCDONOUGH,
Counsel for Respondent.